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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LINDA J. GREGORY,

Petitioner,

v.

THOMAS L. JACOBS & ASSOCIATES AND ATLANTIC RICHFIELD COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether an ERISA Plan That is Silent as to Any Discretionary Power of the Administrator to Interpret or Construe the Plan's Terms and States Only That the Administrator's Decisions as to Benefit Eligibility are Final, Grants Discretionary Powers and Thereby Invokes an Abuse of Discretion Standard of Review Under This Court's Decision in Firestone v. Bruch.

II.

Whether Factual Determinations by an ERISA Administrator are Subject to De Novo Review Under This Court's Decision in Firestone v. Bruch.

III.

Whether Any, or a Scintilla, of Evidence is Sufficient to Uphold an Administrator's Decision to Deny ERISA Benefits Under an Abuse of Discretion Standard.

LIST OF PARTIES AND RULE 29.1 STATEMENT

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5. *Parent company, subsidiary and affiliate of Thomas L. Jacobs & Associates*
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6. *Respondent*
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7. *Parent companies, subsidiaries and affiliates of Atlantic Richfield Company* (ARCO)
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V.

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Petition for Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner LINDA J. GREGORY files her Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals, respectfully requesting that the decision

of the Fifth Circuit be reversed and remanded, and for cause shows:

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, filed February 15, 1995, from which judgment this appeal is taken, is not reported pursuant to the Fifth Circuit's Local Rule 47.5. A copy of the opinion is attached at Appendix D.

The Fifth Circuit's decision affirms the judgment of the United States District Court of the Southern District of Texas, Victoria Division, by the Honorable John D. Rainey. The trial court did not issue a memorandum opinion in this case, but only Findings and of Facts and Conclusions of Law, which are not published. A copy of the trial court's Findings and Conclusions are attached at Appendix B.

GROUNDS FOR JURISDICTION

(1) The Court of Appeals' judgment sought to be reviewed was entered on February 15, 1995.

(2) The order denying Petitioner's Motion for Rehearing was entered April 11, 1995.

(3) Jurisdiction is conferred on this Court by virtue of 28 U.S.C.§1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA), 29 U.S.C. §1132(a)(1)(B); §1133(2):

§1132 (a) Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary-

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

§1133 Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall-

(2) afford a reasonable opportunity

to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

STATEMENT OF THE CASE

Following this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S.101, 103 L.Ed.2d 80, 109 S.Ct. 948 (1989) announcing the proper standards of review to be used in ERISA cases, trial courts and the Circuit Courts reviewing their decisions, have struggled with the application of the *Bruch* rule to particular ERISA plans. The result has been a split among the Circuit Courts on two important issues:

(1) what plan language is sufficient to grant discretion to an administrator on decisions of claims eligibility so as to trigger an abuse of discretion standard of review; and

(2) whether *Bruch* applies to factual determinations of eligibility made by an ERISA administrator.

In *Bruch,* this Court held that ERISA reviews are to be *de novo* unless "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 95. Contrary to the insurance industry's prediction in *Pierre v. Connecticut General Life Insurance Company/Life Insurance Company of North America,* 932 F.2d 1552 (5th Cir. 1991), *cert. denied,* 116 L.Ed.2d 470, 112 S.Ct. 453 (1991), the problems in the application of *Bruch* to particular ERISA plans have not been improved by plan revisions, as evidenced by this case and others.

I. Statement of Facts.

Petitioner Linda Gregory worked full time as a lease pumper for Atlantic

Richfield Oil and Gas Company from the late 1970's until mid-1983, when she injured her back. As a full-time employee of ARCO, Gregory was entitled to benefits under ARCO's ERISA Plan. The Plan provides for long-term disability benefits for employees who are unable to "engage in any gainful occupation or employment for which [the employee is] reasonably fitted by education, training and experience, irrespective of whether any such employment or occupation is available within or offered to [the employee] by [ARCO]."

Aetna, who at the time of Gregory's injuries was the Plan's administrator, originally determined that Gregory was disabled under the Plan's definition of long-term disability. Gregory was classified as an "inactive employee" and began receiving monthly disability

payments from the Plan.

Four years later, Respondent Thomas L. Jacobs & Associates replaced Aetna as the Plan's administrator. Jacobs' agreement with ARCO delegated Jacobs the authority to "make determinations regarding Benefit entitlement under the Plan, including review of denied claims. Jacobs agrees to be named fiduciary, as defined in ERISA, for the purpose of claim determination and review of denied claims. Jacobs' decision on any claim shall be final."

After assuming the responsibilities of Administrator, Jacobs decided to question Aetna's previous determination that Gregory was disabled. Jacobs asked Gregory to fill out one of its forms and to describe her condition, which she did. Jacobs also asked Gregory to have her treating physician prepare a disability

report on one of its forms, which her doctor did.

The report of Gregory's treating neurologist, Dr. Mohammed Khalil, indicated objective findings of lumbar radiculopathy, status post laminectomy and foraminotomy, status post nucleolysis, degenerative changes at L4-5 and L5-S1 by MRI, small herniations at L4-5 and L5-S1 by MRI, and chronic lumboligamentum muscle strain. Dr. Khalil reported that Gregory could not perform any type of work at all at that time.

Upon receipt of Dr. Khalil's report, Jacobs chose to have Gregory undergo an independent medical examination by Dr. Lawrence Wilk, an orthopedic specialist. Dr. Wilk was asked to state whether or not Gregory was "capable of any occupation for which she [is] qualified based on age, training, education and experience," and

to list any specific limitations or restrictions precluding a return to work.

After examining and testing Gregory, Dr. Wilk reported to Jacobs that Gregory was totally disabled from performing her regular occupation as a pumper for ARCO and that she should refrain from bending, stooping, squatting and lifting objects over 15 to 20 pounds. Dr. Wilk advised Jacobs that Gregory could "only do limited sedentary type of activities."

Dr. Wilk also found that more treatment was necessary in order for Gregory to obtain a full recovery. He specifically stated that "a spinal fusion is appropriate in hopes of trying to facilitate a recovery." Although specifically requested to do so, Dr. Wilk failed to answer the question of whether Gregory was able to engage in any gainful employment or occupation for which she was

qualified, and Jacobs never asked him about it again.

Jacobs' own medical director, Dr. Richard Blonsky, reviewed Gregory's claim and found that Gregory would never be able to return to her prior job and that she needed a work hardening/physical therapy program and probably a pain management program before returning to work. Dr. Blonsky likewise failed to address the question of whether Gregory was able to engage in any gainful employment for which she was qualified.

Based upon these reports and without any further review or request for additional information, Jacobs made the determination that Gregory no longer met the Plan's definition of "total disability", and notified Gregory of its intent to terminate her benefits.

Gregory filed an administrative

appeal under the Plan's provisions and furnished Jacobs with additional medical reports from her treating physicians. Dr. Khalil updated his original report with EMG reports, concluding that Gregory was in a nonworking status and was unable to perform any task for gainful employment. Gregory's neurosurgeon, Dr. Chaput, reported to Jacobs that according to his treatment and a recent myelogram, Gregory was unable to perform sedentary work for gainful employment at that time. Dr. Chaput offered further help and clarification if needed.

Jacobs' Benefit Review Committee considered Gregory's appeal, including these two new reports, and without further investigation or participation by its medical director, voted to uphold its prior denial of benefits.

After this decision was made, the

Committee asked its rehabilitation manager to identify occupations that would be appropriate for Gregory. Despite Dr. Wilk's limits on bending, stooping, squatting, and lifting, and the treating physicians' prohibition of any work, Mr. Radke identified the following occupations which Jacobs deemed suitable for Gregory:

miller
mixer operator
burner tender
children's attendant
checkroom attendant
mill-and-coal-transport operator
hammer-mill operator
service establishment attendant
companion
host-hostess
mixer operator, carbon paste
sulfate drier-machine operator
sand-cutter operator
spray-drier operator
mixer, diamond powder
lime slaker

The rehabilitation manager's determination was made without any investigation or evidence of occupations for which Gregory was qualified, based on

her age, training, education and experience. No medical review was made of these possible occupations.

The Benefit Review Committee did not review the findings of Mr. Radke or check to see whether his findings complied with the restrictions placed on Gregory by her doctors, but instead informed Gregory that its prior decision to terminate her long-term disability benefits had been upheld.

2. *Procedural History.*

Petitioner Linda Gregory filed suit against ARCO and Jacobs under ERISA, seeking to recover her long-term disability benefits. Pursuant to an agreement between the two Respondents, Jacobs took over the full defense of the suit.

The district court ruled that the appropriate standard of review was abuse

of discretion, rather than de novo, based upon its finding that the Plan granted Jacobs sufficient discretionary authority to determine Gregory's eligibility for long term benefits. *See CL #3; App. B.* Following a trial on the merits, the trial court found that Jacobs as the Administrator did not act arbitrarily and capriciously and therefore did not abuse its discretion in terminating Gregory's benefits. *See CL #6; App. B.*

Gregory appealed to the Fifth Circuit Court of Appeals, which Court ruled that the trial court used the correct standard of review because the Plan granted Jacobs discretion, and that it correctly determined Jacobs did not abuse its discretion in denying Gregory's benefits. *See App.D.*

3. Basis for Federal Jurisdiction in the First Instance.

Federal jurisdiction was conferred in the first instance by virtue of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1132(a)(1)(B).

ARGUMENTS SUPPORTING GRANT OF WRIT

1. A De Novo Standard of Review Should Apply Where an ERISA Plan is Silent as to any Discretionary Power of the Administrator to Construe or Interpret the Plan and States Only that its Determinations of Eligibility are to be Final.

Despite *Bruch's* significant change in standards of review to be used by the Courts in ERISA cases, a change expressly designed to protect the rights of ERISA claimants, the Fifth Circuit Court of Appeals has since the time of that decision, repeatedly and almost uniformly construed plan language as granting discretionary powers to the plan administrators. Significant to the case at hand, the Fifth Circuit has held that a plan's grant of general administrative powers is sufficient to trigger an abuse of discretion standard. *See, e.g. Duhon v. Texaco, Inc.*, 15 F.2d 1320 (5th Cir. 1994); *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096,

1099 (5th Cir. 1990). This interpretation of *Bruch* is incorrect, is at odds with the Fifth Circuit's sister courts, and effectively nullifies the rights of claimants that ERISA was intended to protect.

In the case at hand, the trial court and the Fifth Circuit construed the following language to confer upon Jacobs as the administrator and fiduciary "sufficient discretionary authority" to determine claims eligibility for benefits under the Plan:

> [ARCO] has appointed Jacobs claim administrator with authority to make determinations regarding Benefit entitlement under the Plan, including review of denied claims. Jacobs agrees to be named fiduciary, as defined in ERISA, for the purpose of claim determination and review of denied claims. Jacobs' decision on any claim shall be final.

This language simply appoints a claims administrator - no more and no less. The Plan language is totally silent

as to any power on Jacob's part to construe or interpret the terms of the Plan and to any deference to be given it on eligibility determinations. It is, accordingly, insufficient to grant Jacobs discretionary powers. *See Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176, 1183 (3rd Cir. 1991); *Taylor v. Continental Group Change in Control Severance Pay Plan*, 933 F.2d 1227, 1232 (3rd Cir.1991); *Baxter v. Lynn* 886 F.2d 182, 188 (8th Cir. 1989); *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153-54 (8th Cir. 1990); *Baker v. Big Star Division of the Grand Union Company*, 893 F.2d 288, 290-91 (11th Cir. 1989).

While the Plan certainly places Jacobs in the position of making eligibility determinations, ARCO did no more than "rent" Jacobs' claims processing

department to review claims and determine the amount payable in accordance with the terms and conditions of the Plan. *See Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 290 (11th Cir. 1989).

The Fifth Circuit has held that a plan's language providing that an administrator's decision is final is itself enough to confer discretionary authority under *Bruch*. *See Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1305-06 (5th Cir. 1994).

Finality of a decision, however, is a different concept from discretionary deference. The Eighth and Seventh Circuits have specifically ruled that the fact that a plan provides for the administrator's decision to be final, is not an express grant of discretionary authority. *See Baxter v. Lynn*, 886 F.2d 182, 188 (8th Cir. 1989); *Ziaee v. Vest*, 916 F.2d

1204, 1207 (7th Cir. 1990); *Petrilli v. Dreschsel* 910 F.2d 1441, 1447 (7th Cir.1990).

In *Baxter*, the Eighth Circuit held that language requiring trustees to make a final determination of an employee's eligibility under the plan does not necessarily confer discretionary authority to render decisions with regard to ambiguous provisions of the plan. *See Baxter*, 886 F.2d at 188. The Eighth Circuit reasons that the finality language merely describes the trustees' mandatory role in accepting or rejecting claims. *Id.* at 188.

Similarly, the Seventh Circuit has held that finality language gives the administrator the power to decide, but does not imply discretion to construe. *See Ziaee*, 916 F.2d at 1207; *Petrilli*, 910 F.2d at 1447.

To adopt the Fifth Circuit's

interpretation of *Bruch* would mean that every plan grants the administrator discretionary authority because every plan provides for the administrator to make eligibility determinations. Here, as in *Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176, 1882 (3rd Cir. 1991), there is no language, express or implied, granting the administrator the power to construe or interpret the terms of the Plan or deference to its eligibility decisions, but only a grant of general administrative powers.

In *Luby*, the Third Circuit observed that if a plan's grant of general administrative power is construed to be the general grant of discretionary power to decide all disputes arising under the Plan, then an ERISA plan administrator's decisions might all be subject to

deferential review. *Id.* at 1180-81. The Third Circuit further observes that such a conclusion would defeat this Court's purpose in *Bruch*: to insure that when a plan's terms do not confer certain discretionary powers on a plan trustee, a trustee's exercise of such discretion is subject to *de novo* review. *Id.* at 1181.

A de novo review of eligibility determinations helps to insure that ERISA is applied in the way it was intended - to promote the interests of employees and their beneficiaries in employer benefit plans. *See Bruch*, 489 U.S. at 115; *Masella v. Blue Cross & Blue Shield of Conn., Inc.*, 936 F.2d 98, 103 (2nd Cir. 1991); *Luby*, 944 F.2d at 1181.

Because the Circuit Courts are expressly split on this issue and because the Fifth Circuit's holdings in this case

and others conflict with this Court's decision in *Bruch*, writ should be granted pursuant to Supreme Court Rules 10(a) and 10(c) to address this important issue.

2. *A De Novo Standard of Review Should Apply When an Administrator Makes Factual Determinations of Benefit Eligibility.*

A closely related question that has created a split among the Circuit Courts is whether this Court's decision in *Bruch* applies to an administrator or fiduciary's factual determinations at all.

The Fifth Circuit has specifically held that *Bruch* does not apply to claim eligibility determinations made by administrators, reasoning that factual determinations are by their nature discretionary. *See Duhon v. Texaco, Inc.*, 15 F.3d 1302, 1306 (5th Cir. 1994); *Southern*

Farm Bureau Life Insurance Company v. Moore, 993 F.2d 98, 101 (5th Cir. 1993); *Pierre v. Connecticut General Life Insurance Company/Life Insurance Company of North America*, 932 F.2d 1552, 1558 (5th Cir. 1991) *cert. denied*, 116 L.Ed.2d 470, 112 S.Ct.453 (1991) (White, J., dissenting from denial of certiorari); *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1099 (5th Cir. 1990). The Fifth Circuit has thereby judicially created an exception to *Bruch*.

The remaining Circuits that have addressed this issue have reasoned that *Bruch* applies equally to an administrator's decision in construing the terms of a plan and in making determinations of eligibility that turn on facts. See *Masella v. Blue Cross & Blue Shield of Conn., Inc.*, 936 F.2d 98 (2nd Cir.1991); *Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176,

1183 (3rd Cir.1991); *Reinking v. Philadelphia American Life Insurance Company*, 910 F.2d 1210, 1213-14 (4th Cir. 1990); *Wallace v. Firestone Tire & Rubber Co.*, 882 F.2d 1327 (8th Cir. 1989). *See also Petrilli v. Dreschel*, 910 F.2d 1441 (7th Cir. 1990).

As a practical matter, any factual determination of whether a certain claim falls within the terms of a plan, entails some construction of the plan's terms. Therefore, it would be an artificial and unworkable scheme to require a distinction between the two for purposes of which standard of review to apply.

There is no policy reason under trust law to make a distinction between the two types of decisions. This Court's opinion in *Bruch* makes no distinction between the standard of review to utilize when an administrator makes a factual

determination as opposed to an interpretation decision, and, in fact, specifically refers in its holding to the discretionary authority to determine eligibility for benefits. *See Bruch*, 489 U.S. at 115.

In the case at hand, the decision made by Jacobs is both factual and interpretative of the Plan's provision for long-term disability benefits. The question of which standard of review should be applied should not turn on such a blended distinction.

The Fifth Circuit's approach defeats this Court's purpose in *Firestone*: "to insure that when a plan's terms do not confer certain discretionary powers on a plan trustee, a trustee's exercise of such discretion is subject to a *de novo* review". *See Luby*, 944 F.2d at 1181.

Because the application of *Bruch* continues to be problematic for practitioners, district courts and the Circuit Courts, creating a split on this issue with the Fifth Circuit alone holding that *Bruch* does not apply to factual determinations by an administrator, writ should be granted under Rule 10(a) and 10(c) of the Supreme Court Rules. *See Pierre*, 116 L.Ed.2d at 4701 (White, J., dissenting from denial of certiorari).

3. *More Than a Scintilla of Evidence Should be Required in Order to Uphold an Administrator's Decision to Deny ERISA Benefits Under an Abuse of Discretion Standard.*

Even if abuse of discretion were the proper standard of review in this case, the trial court and the Fifth Circuit improperly applied this standard to the

facts of this case and to the terms of ARCO's plan. The lower courts upheld Jacobs' decision apparently by finding *some* evidence supporting its denial of benefits. A finding of "any" evidence should not be the test, even for abuse of discretion. Under any standard of review, de novo or abuse of discretion, the evidence in this case shows a clear violation of Gregory's right to receive benefits under ARCO's plan.

Jacobs' primary abuse is its disregard of the reports of Gregory's treating physicians, especially as there is no evidence contradicting their findings.

Gregory's treating neurologist, Dr. Khalil, states that Gregory is unable to perform any type of work, and details his objective findings supporting this conclusion in his report to Jacobs.

Gregory's treating neurosurgeon, Dr. Chaput, reports that Gregory is unable to perform sedentary work for gainful employment, based upon a recent myleogram. Even the independent medical examiner and Jacobs' own on-staff medical director fail to ever state whether Gregory could perform work for which she was qualified, as the Plan requires before a denial of long-term disability benefits. He also states that Gregory would need to complete a work hardening program before she could work.

Under the Fifth Circuit's own rule, Administrators are required to defer to the treating physicians "unless substantial evidence contradicts the testimony." *See Floyd v. Bowen*, 833 F.2d 529, 531 (5th Cir. 1987)(SSI case). Here, the non-treating doctors not only do not contradict Gregory's treating doctors,

they mirror them. Jacobs nevertheless chose to ignore the treating doctors' opinions.

Further abuse is shown by Jacobs' failure to obtain full medical records and opinions before making its decision to deny Gregory's benefits. Despite the fact that both the independent medical examiner and Jacobs' own doctor failed to answer the Plan's determinative question of whether Gregory can perform any gainful employment for which she is qualified, Jacobs failed to do any further investigation, and instead denied benefits without having the necessary information before it.

After that decision was made, Jacobs requested that its rehabilitation manager list occupations for which Gregory was qualified, given her skills and restrictions. No medical review was made

of this list, and by their very descriptions, the jobs listed (even if there was any evidence that Gregory was qualified to perform them) violated the independent medical examiner's limitations on bending, squatting, scooping and lifting.

Under any standard of review, the record shows that Jacobs acted arbitrarily and capriciously in deciding to deny the benefits first and then later rationalizing and reconstructing a purported basis to support that decision. *See Marecek v. BellSouth Services, Inc.*, 49 F.3d 702, 707 (11th Cir. 1995). There is no more than a scintilla of evidence, if any, in the record to support the administrator's denial of Gregory's benefits.

Under Rule 10(c), writ should be granted for the additional reason that the Fifth Circuit has decided an important

question of federal law which should be settled by this Court.

4. Conclusion.

Since the time of ERISA's inception, the Fifth Circuit Court of Appeals' ERISA decisions have eroded the protections made available to employees by that legislation. Even after the admonitions issued by this Court in *Firestone v. Bruch*, the Fifth Circuit ignores the proper standard of review mandated by this Court.

Because this problem has not been corrected by revisions in ERISA plans, as predicted by the insurance industry in *Pierre*, this Court should grant Writ of Certiorari to reinstate the protections of ERISA and *Bruch*.

Respectfully submitted,

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